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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

8 BOBBY JOE JOHNSON, JR.,

9 Plaintiff,

10 v.

11 DEPARTMENT OF CORRECTIONS, et
12 al.,

13 Defendants.

Case No. C08-5426BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION IN
PART AND GRANTING
PLAINTIFF'S MOTION TO
AMEND

14 This matter comes before the Court on the Report and Recommendation of the
15 Honorable J. Kelley Arnold, United States Magistrate Judge (Dkt. 6), and Plaintiff's
16 objections to the Report and Recommendation (Dkts. 8 and 10).

17 **I.BACKGROUND**

18 On May 29, 2008, Plaintiff filed a Complaint in Thurston County Superior Court
19 alleging Defendants had violated his liberty interests under the United States Constitution by
20 denying him visitation rights with his wife. Dkt. 1, 24-27. Plaintiff also alleged violations of
21 the Eighth Amendment for cruel and unusual punishment, as well as violations of the First
22 and Fifth Amendments. This case was removed to federal court. On August 5, 2008,
23 Defendants filed a motion to dismiss for failure to state a claim upon which relief can be
24 granted under Federal Rule of Civil Procedure 12(b)(6). Dkt. 4.
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1 On August 28, 2008, Judge Arnold issued a Report and Recommendation, concluding
2 that Defendants' motion should be granted because prisoners do not have constitutional
3 rights to visitation. Dkt. 6 at 4.

4 On September 9, 2008, Plaintiff filed objections to the Report and Recommendation.
5 Dkt. 8. It is unclear whether Plaintiff is specifically objecting to the Report and
6 Recommendation. In his objections, Plaintiff moves the Court to amend his complaint to
7 allege the following causes of action: (1) Defendants violated his equal protection rights
8 because other prisoners were allowed visitation with spouses who had similar criminal
9 backgrounds to that of his spouse, (2) Defendants retaliated against Plaintiff because he had
10 filed grievances, and (3) Defendants' decision to deny him visitation rights was arbitrary and
11 capricious. *See* Dkt. 7 (proposed amended complaint), *see also* Dkt. 8 and Dkt. 10 (second
12 objection). The Court notes that Plaintiff improperly filed a second objection to the Report
13 and Recommendation. The Court has considered both objections, but directs the Plaintiff to
14 comply with the Local Rules of Civil Procedure.

15 On September 26, 2008, Defendants filed a response to Plaintiff's objections. Dkt. 9.
16 Defendants move the Court to adopt the Report and Recommendation and deny Plaintiff's
17 request to amend his complaint because allowing Plaintiff to do so would be futile.

18 II. DISCUSSION

19 A. DEFENDANTS' MOTION TO DISMISS

20 The Court adopts Judge Arnold's motion to dismiss Plaintiffs' claims in his original
21 complaint. Plaintiffs' cause of action alleging violations of his liberty interests, cruel and
22 unusual punishment, due process, and freedom of association under the Constitution, are
23 dismissed with prejudice.

24 B. PLAINTIFFS' MOTION TO AMEND

25 A party who moves to amend a complaint more than 20 days after serving the
26 pleading must either obtain the opposing party's consent or the court's leave. Fed. R. Civ. P.
27 15(a)(2). "The Court should freely give leave when justice so requires." *Id.* In considering

1 whether to permit amendment, courts consider the following factors: “(1) bad faith, (2)
2 undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether
3 plaintiff has previously amended his complaint.” *Allen v. City of Beverly Hills*, 911 F.2d
4 367, 373 (9th Cir. 1990).

5 The Court concludes that providing Plaintiff leave to amend his complaint is
6 appropriate. This case is in its early stages of litigation and the Court does not find that
7 Plaintiff has moved to amend his complaint in bad faith or with intent to cause undue delay.
8 The Court also concludes that Defendants will not be unduly prejudiced by permitting
9 Plaintiff to amend his complaint.

10 Finally, the Court does not find that it is futile to allow Plaintiff to amend his
11 complaint at this time. Plaintiff alleges equal protection violations based on his allegation
12 that similarly situated prisoners have received more favorable treatment under the prison
13 visitation policies, and has alleged retaliation based on the grievances he has filed.
14 Defendants may again move the Court to dismiss these amended claims as provided in the
15 Federal Rules of Civil Procedure if warranted.

16 Plaintiff has filed an amended complaint. Dkt. 7. Only those claims in the amended
17 complaint may proceed. The case is hereby re-referred to Judge Arnold.


18 **III. ORDER**

19 The Court having considered the Report and Recommendation, Plaintiff’s objections,
20 and the remaining record, does hereby find and order:

- 21 (1) The Court **GRANTS** Plaintiff’s request for leave to amend his complaint; and
22 (3) The Court adopts the Report and Recommendation (Dkt. 6) to the extent that
23 Plaintiff’s claims in his original complaint are **DISMISSED WITH**
24 **PREJUDICE**; and
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1 (4) The case, including all pending motions, is **RE-REFERRED TO UNITED**
2 **STATES MAGISTRATE JUDGE J. KELLEY ARNOLD** in accord with
3 the original order of reference.

4 DATED this 29th day of October, 2008.

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8 BENJAMIN H. SETTLE
9 United States District Judge
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